

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 21 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0080-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ERIC LANOUE,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2010123761003DT

Honorable Maria Del Mar Verdin, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney  
By Andrea L. Kever

Phoenix  
Attorneys for Respondent

Eric Lanoue

Tucson  
In Propria Persona

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, Eric Lanoue was convicted on December 13, 2010, of sexual conduct with a minor and two counts of attempted molestation of a child, all dangerous crimes against children. The trial court sentenced him to twenty-four years

in prison, followed by lifetime probation, in accordance with the stipulated sentence contained in his plea agreement.

¶2 In his first, untimely notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., on April 26, 2011, Lanoue indicated he was raising a claim based on newly discovered material facts.<sup>1</sup> *See* Ariz. R. Crim. P. 32.1(e). Although he asserted that he was unable to raise a claim in a timely manner because of facts that had been “newly discovered,” he failed to identify any such facts, and so necessarily failed to address how any newly discovered facts would have affected his verdict or sentence or why such unidentified facts were unavailable to him at his change-of-plea hearing, at sentencing, or within ninety days of judgment. *See id.* (authorizing relief if defendant can show he “exercised due diligence” in discovering, after trial, material facts that “probably would have changed the verdict or sentence”); Ariz. R. Crim. P. 32.4(a) (pleading defendant’s first Rule 32 notice “must be filed within ninety days after the entry of judgment and sentence”); *see also State v. Pac*, 175 Ariz. 189, 192, 854 P.2d 1175, 1178 (App. 1993) (for relief pursuant to Rule 32.1(e), “the evidence must have existed at the time of trial, but have been discovered after trial”).

¶3 The trial court dismissed Lanoue’s notice, finding he had “fail[ed] to state a claim for which relief can be granted in an untimely Rule 32 proceeding.” In the petition for review that followed, Lanoue appears to argue the trial court abused its discretion in

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<sup>1</sup>Lanoue suggested in his notice that he had initiated previous Rule 32 proceedings. Based on the record before us, we agree with the trial court that this is his first notice of post-conviction relief.

dismissing his notice and asks us to remand the case for an evidentiary hearing.<sup>2</sup> “We review [a] court’s summary denial of post-conviction relief for an abuse of discretion.” *State v. Martinez*, 226 Ariz. 464, ¶ 6, 250 P.3d 241, 243 (App. 2011). We find no abuse of discretion here.

¶4 Pursuant to Rule 32.4(a), “[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” And, under Rule 32.2(b),

When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

Although Lanoue had suggested his claim was grounded on newly discovered material facts, and thus excepted from preclusion under Rules 32.1(e) and 32.2(b), his notice included neither “the substance of the specific exception” nor “meritorious reasons . . . indicating why the claim was not stated . . . in a timely manner.” Ariz. R. Crim. P.

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<sup>2</sup>Lanoué also appears to argue we should remand his case because his “newly discovered exculpatory evidence,” which remains unidentified, relates to a claim that he should have received “an evaluation for psychiatric symptoms . . . before sentencing.” We will not address this issue, raised for the first time in Lanoué’s petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised for first time in petition for review).

32.2(b). Accordingly, the trial court did not abuse its discretion in summarily dismissing Lanoue's notice of post-conviction relief.<sup>3</sup>

¶5 For the foregoing reasons, although we grant review, we deny relief.

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

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<sup>3</sup>We find no abuse of discretion because the trial court reached the only correct result under Rule 32.2(b), the rule that governs summary dismissal of a notice of post-conviction relief. To the extent the court relied on Rule 32.5 to conclude Lanoue's notice was subject to dismissal because he had not attached "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition," Ariz. R. Crim. P. 32.5(a), we disapprove its analysis. Rule 32.5 sets forth the requirements for a Rule 32 petition, not an initial notice. *Id.*